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No. ~~10,606~~

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE A. KOCH, Executor of the Estate of Adolph J. Koch, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONER.

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STATEMENT OF JURISDICTION.

This is a petition to review a decision of the U. S. Tax Court entered on April 14, 1943, in favor of the respondent which determines a deficiency of estate tax in the amount of $22,544.18. (Tr. p. 25.)

The proceeding in the Tax Court was begun by the filing of a petition on June 28, 1941. (Tr. p. 1.) An amended petition was filed on August 16th. (Tr. pp. 2 to 22.) Respondent's answer was filed on September 3, 1941. (Tr. pp. 2, 23, 24.)

The petitioner on review is the duly appointed, qualified and acting executor of the Estate of Adolph J. Koch, deceased (hereinafter referred to as the tax-

payer) and his address is Hotel Durant, Durant and Bowditch Streets, Berkeley, California.

The respondent on review is the duly appointed, qualified and acting Commissioner of Internal Revenue (hereinafter referred to as the Commissioner) under the authority of the laws of the United States.

The petitioner filed a federal estate tax return on October 19, 1939 with the Collector of Internal Revenue for the first district of California, which office is within the jurisdiction of this Honorable Court.

The Court in which the review of this case is sought is the United States Circuit Court of Appeals for the Ninth Circuit.

Petitioner files this petition for review pursuant to the provisions of sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE.

The nature of the controversy is as follows, to wit:

This proceeding involves a deficiency in federal estate tax of $22,544.18. Respondent determined that certain transfers made by the decedent within two years prior to his death of property having an aggregate value of $204,442.51 were made in contemplation of death and included this amount in the gross estate of decedent under sections 811 (c) and 811 (d) of the Internal Revenue Code.

The decedent Adolph J. Koch died on June 29, 1939 at the age of 84 years. On December 20, 1938 he had made a gift in trust to his grandson Ralph,

the son of a deceased daughter, of properties valued on the date of his death at $79,001.53 for the purpose of making the boy absolutely independent of his stepmother and father and to make sure that he got an education at Stanford University and could later establish himself in business. This gift in trust, under section 2280 of the California Civil Code, was subject to a power of the decedent to revoke, as the trust was not made specifically irrevocable. During the month of January 1939 he made further gifts to Ralph valued on the date of his death at $21,000. On these two occasions he made several gifts of properties outright to his son George valued at $79,290.98 and $21,000 respectively to equalize the gifts to the grandson and in pursuance of a long standing policy of liberal dealing with his son.

The decedent paid federal gift taxes on these gifts in the amount of $7547.06 for 1938 and $5374.12 for 1939. After making these gifts, the decedent had cash and properties left of an aggregate value of $142,605.39.

Petitioner on review contends that these gifts were not made in contemplation of death, that the decedent who was in good health for a man of his age made the gifts because of motives associated with life which he disclosed in statements to his attorney, son and closest associates and which were supported by the surrounding circumstances.

With respect to the gift in trust of December 20, 1938, to his grandson there is an additional question as to whether that gift was includible in decedent's

gross estate under section 811 (d) of the Internal Revenue Code because the decedent had a power to revoke, statutorily imposed upon the trust by section 2280 of the California Civil Code.

The Court below has held that the gifts were "substitutes for testamentary dispositions of decedent's property" and has required their inclusion in the gross estate of decedent with a resultant deficiency of $22,544.18.

SPECIFICATION OF ERRORS.

The taxpayer's assignments of error are as follows:

(1) The Court erred in that there was no substantial evidence to sustain the finding that the transfers were made in contemplation of death.

(2) The Court erred in that the facts found do not sustain the conclusions of law and the decision which it reached.

(3) The Court erred in that it incorrectly applied the law applicable to the facts.

(4) The Court erred in failing to find as a fact that decedent reserved a power to change, alter, amend and revoke the trust for the grandson Ralph.

(5) The Court erred in that it made inadequate findings of fact in the following respects:

(a) The Court failed to find that the decedent both before and when the gifts were made told his attorney, his son, his housekeeper and others that he

was making the gift to his grandson Ralph because he wanted the boy to be independent of his stepmother and father and so that he could go to Stanford and later go into business.

(b) The Court failed to find that the decedent when the gifts were made told his attorney and his son that he was making the gift to his son George because he wanted to equalize the gift to his grandson Ralph.

(c) The Court failed to find that there had been conflicts between the decedent's grandson and his stepmother and between the decedent and the boy's parents which had made decedent bitter.

(d) The Court failed to find that the decedent bought a new car in 1938 and applied for a license to drive the car and that he then drove the car around, both alone and with his friends.

(e) The Court failed to find that during 1938 and 1939 the decedent was very active at the meetings of the Finance Committee of the San Jose Building and Loan Association and went out and examined the properties on which loans were to be made.

(f) The Court failed to find that the decedent at 82 years of age had gone back to active participation as a director and vice president of the San Jose Building and Loan Association at the request of the board of directors.

(g) The Court failed to find that on December 21, 1938, the day after he had made two of the gifts, he attended a meeting of the directors of the San Jose

Building and Loan Association at which he made a motion which was carried to accept repayment of a loan totaling over $500,000 without the payment of a penalty for prepayment and led the discussion.

(h) The Court failed to find that, if the decedent did suffer a stroke on May 18, 1938, he was not informed of the fact by the attending physician or any one else.

(i) The Court failed to find that the decedent believed that he would live to be a hundred years of age and would outlive his son-in-law.

(j) The Court failed to find that the decedent up to date of his death attended personally to all the details of his business affairs, purchased stocks and bonds, drew his own checks, paid taxes, etc.

(6) The Court erred in finding that on May 18, 1938 the decedent had a paralytic stroke.

(7) The Court erred in stating that the decedent was pretty much of an invalid at any time as a result of the automobile injury, the alleged paralytic stroke or from any other cause.

(8) The Court erred in finding that the transfers by the decedent were made in contemplation of death.

(9) The Court erred as a matter of law in holding that these transfers were made in contemplation of death.

(10) The Court erred as a matter of law in completely disregarding the decedent's own declarations as to the reasons he was making the gifts.

(11) The Court erred in failing to find that these transfers were made through motives associated with life.

(12) The Court erred in entering its final order of redetermination on April 14, 1943, that there was a deficiency in estate tax of $22,544.18.

STATUTES INVOLVED.

Section 2280, California Civil Code.

"Unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee. When a voluntary trust is revoked by the trustor, the trustee shall transfer to the trustor its full title to the trust estate. Trusts created prior to the date when this act shall become a law shall not be affected thereby."

Section 811, Internal Revenue Code—Gross Estate.

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States.

* * * * * * *

(c) Transfers in Contemplation of, or Taking Effect at Death.—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or other-

wise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(d) Revocable Transfers. (1) To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or moneys worth) by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power) to alter, amend, revoke or terminate, or where any such power is relinquished in contemplation of decedent's death.

ARGUMENT.

POINT I.

THERE WAS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE FINDING AND CONCLUSION OF LAW THAT THESE GIFTS WERE MADE IN CONTEMPLATION OF DEATH AND THE COURT APPLIED AN ERRONEOUS PRINCIPLE OF LAW TO THE FACTS.

(a) The Court below overlooked the fact that the decedent retained a power to revoke the December 20, 1938 trust.

The Court below found that "no power to change, alter or amend the trust was reserved in the settlor" (Tr. p. 29), completely overlooking the fact that one of the Commissioner's grounds for determining a deficiency was the fact that the decedent did reserve this power and that Section 2280 of the Civil Code of California provides that "unless expressly made irrevocable by the instrument creating the trust, every voluntary trust shall be revocable by the trustor by writing filed with the trustee." (Tr. pp. 9, 10.)

The trust agreement of December 20, 1938, for the benefit of decedent's grandson, Ralph Sickard, was not expressly made irrevocable by the trust indenture (Tr. pp. 288, 289, 290) and therefore could have been revoked by the decedent, Adolph Koch, at any time before his death.

Since the agreement was drawn by the decedent's attorney, Faber Johnston, after a conference with the decedent, during which the latter suggested the provisions of the trust (Tr. pp. 75, 76), it is reasonable to assume that if Mr. Johnston was not directed by the decedent to make the agreement revocable, he fully advised him of the legal effect of not specifically mak-

ing it irrevocable and that the decedent approved this retention of a power in himself to revoke the agreement at any time.

The retention of the power to revoke looked to further activity, management and discretion which was necessarily associated with motives of life.

(b) The Court disregarded the decedent's statements which, supported as they were by the surrounding circumstances, were the best evidence of both his motive and mental condition.

The Court below completely disregarded statements made by the decedent to his attorney, son and housekeeper which clearly disclosed both his motive in making the gifts and his mental condition at the time. These statements were amply supported by the surrounding circumstances.

It is difficult to see what better proof there could be of the decedent's motive and his state of mind than his own statements. To give them no probative force at all is to impugn without justification the veracity of the decedent. Surely no one should know better than he why he made these gifts.

The United States Court of Claims, whose judgment in *Wells v. United States* (69 Ct. Cls. 485, 39 Fed. (2d) 998) in favor of the tax payer was affirmed by the Supreme Court (*United States v. Wells,* 283 U. S. 102), recognized the almost conclusive probative value of a decedent's statements which, like these here, were supported by all the circumstances surrounding the transfers. The decedent had made repeated statements to close friends and associates about the condi-

tion of his health and his motives. The Court accepted these statements at face value. Concerning them it said at page 1011:

> "The best evidence of the decedent's state of mind and the reasons activating him in making the transfers are the statements and expressions of the decedent himself, supported as such statements are by all circumstances concerning the transfer."

Estate of Joseph W. Marsh, B.T.A. Memo Dec. 42,090, 1942 P.H. Tax Service 64,332, is another case where a statement of the decedent disclosing his state of mind was given effect. At the age of *77 years* the decedent had irrevocably transferred certain insurance policies in trust; about a *month* after this he had died. When he created the trust he was not in the best of health. He was told by one of the officials of the trust company, which acted as the trustee, that under the Federal Tax Law, should he die within two years of the execution of the trust, there was a presumption that the instrument was executed in contemplation of death. Decedent laughed and said, "We don't need to worry about that. I expect to live a long time." To other associates he expressed the belief that he would live to a ripe old age. Decedent did not take seriously his physician's idea that he was not a well man. It was held that the transfer was not in contemplation of death.

In the instant case the disregarded statements clearly revealed the decedent's mental condition when he made the gifts. He said to his son-in-law, "Don't worry about me croaking, I'll live longer than you

do'' (Tr. p. 156), and to his housekeeper, ''I'm going to live to be a hundred.'' (Tr. p. 150.) The circumstances surrounding these statements will be discussed in detail hereinafter.

He was also told why he was making the gifts. When the Court below stated ''there is very little evidence in the record upon which to rest a finding that any of his gifts were in this category'', i.e., gifts motivated by impulses primarily associated with life (Tr. p. 37), it ignored the several statements made by the decedent to his attorney, Faber Johnston, his son George, his housekeeper, Angelyn Compton and others, in which he disclosed his motive, as well as a background of family conflict which gave these statements full content.

The result was a decision couched in words of indecision. With respect to the trust for Ralph the Court states that ''it is *difficult* to see why it was created, if it were not for the reason determined by the respondent''. Of the gift to George, it states that ''the gifts to the son *seem* to be in the same category. They, like the gifts to Ralph, *appear* to have been made as substitutes for and in lieu of testamentary disposition of his property.'' (Tr. pp. 39, 40; italics supplied.)

When the decedent made the transfers he told his attorney, who drew the trust agreement of December 20, 1938, that Ralph's father ''refused to send the boy to college; that he said he couldn't afford it; that he (decedent) said he was going to send him to college and that Mr. Swickard (the boy's father) objected to it and that he (decedent) was going to send him to college''. (Tr. pp. 79, 80.)

He then went on to say that he was "going to fix it so the boy would be absolutely independent and that his father or his stepmother would have nothing to do with the boy's business" and that *"this was why* he was transferring this property to the boy so he would be absolutely independent of his stepfather and mother". (Tr. pp. 79, 80.) This conversation was held in the attorney's office. (Tr. p. 79.)

Prior to this conversation, there had been a number of family "falling outs" between him and the boy's parents over their treatment of the boy. He told his housekeeper that "Ralph was kind of kicked out", that "she (the stepmother) had never been a mother to that boy" (Tr. p. 144), and that "Ralph has got no home, he has got no mother." (Tr. p. 145.) The boy's parents had forced him to live in the backyard instead of their house (Tr. p. 80), the stepmother had refused to wash and mend his handkerchiefs and clothes (Tr. p. 144); the parents had complained about the decedent giving the boy $250.00 to go to a Monterey preparatory school (Tr. pp. 155, 156), and they had objected to the decedent sending him to Stanford. (Tr. pp. 145, 156.) These conflicts had caused decedent great mental anguish (Tr. p. 144) and he was bitter to the point of obsession. (Tr. p. 165.)

He told his housekeeper that "Ralph's stepmother was jealous because her boy couldn't go to Stanford and didn't want Ralph to go for that reason, but that Ralph has no home and he has got no mother and I am going to give Ralph a good education and put him in business (Tr. p. 145), and on another occa-

sion, "I am going to give Ralph the money to put him through Stanford." (Tr. p. 145.)

He told his son George, "I don't like the way Ralph's father and mother are acting. I gave him $500.00 and told both the father and stepmother that the boy had gotten his credits and he was going to Stanford and they said, 'well, he isn't going to Stanford, we can't see him through' and I said 'well I am going to see the boy through'." (Tr. p. 156.)

When Ralph's stepmother told him that she didn't want Ralph to go to Stanford because "her own boy didn't have an opportunity and that there was no reason that he couldn't go to our State School here and live home" he told her "I want Ralph to have the same opportunity that George's boy had" and that "I am going to see him through Stanford." (Tr. p. 156.)

All of these conversations took place in the summer and fall of 1938, before and after Ralph had entered Stanford. While some of them are general, they reveal the formation of an intent which had become crystallized when he told his attorney that he was transferring the property to the boy so he could go to college and be independent of his parents.

Though decedent's explanation of his own motive was a satisfactory one in light of these family quarrels, the Court below substituted its own. "Decedent must have known in the latter part of 1938 that Ralph had no immediate need for any large sum of money and that several years would elapse before he could embark on a business career. So long as decedent

lived he was in a position to furnish Ralph with funds required, either for his education or his business." (Tr. p. 38.)

Of course, the decedent knew that so long as he lived he could furnish Ralph the money needed to go to Stanford, but the boy's father and stepmother were objecting to his doing so. They were afraid that if anything happened to the decedent while Ralph was at Stanford they would be straddled with the expense of keeping him there. *They* were contemplating the possibility of his death. When the decedent in the fall gave Ralph $500 to enter Stanford the issue had come to a head. Both the parents had come over to see him and had renewed their objections. The boy's father said, "Well, he isn't going to Stanford, we can't see him through." The decedent answered, "Well, I am going to see him through." The father then said, "Well, how do we know that you are not going to croak, Mr. Koch, and that this money is going to come forth?" The decedent replied, "Don't worry about me croaking. I'll live longer than you do." (Tr. p. 156.)

This pressing situation was the reason he "advanced the time of enjoyment by Ralph of such a substantial portion of his property". (Tr. p. 38.) He wanted to remove the fear of Ralph's parents and the objection based on it as well as to restore peace in the family and to insure against the contingency of Ralph being forced by his parents to withdraw from Stanford at some future date.

No doubt, too, Ralph must have been disturbed by these quarrels. He must have felt a sense of insta-

bility, knowing that his college career might be cut short by his parents. What could be more natural than that the decedent should wish to secure the boy's mental tranquility to enable him to more effectively pursue his studies?

This motivation established, the gifts to George are seen to be made to equalize the ones to Ralph. This is a familiar motive where a donor has several children. He wants to even things up and not favor one child over another. "Now George, I want you to take some comparable amount for yourself." (Tr. p. 159.)

In *Henshaw v. Anglim,* 1940, P.H. Tax Service, par. 63,034, the decedent, who was a woman of the advanced age of 82 years, was suffering from a chronic stomach disturbance at the time she made a gift of cash and securities of a value of about $10,000. The purpose of the gift, which was made almost a year before she died, was to equalize gifts that she had made to a deceased son. She told her son, "Suppose I give you my brokerage account with Dean Witter. He (the other son) has gone and I feel I want to do something for you while you are young enough to enjoy it." There was no direct evidence offered to show that the gift was made in contemplation of death. Like Koch, the decedent was in good spirits, was mentally alert and keenly interested in things about her. There was nothing in her attitude to indicate any contemplation by her of the imminence of death. In holding for the taxpayer the Court said:

> "The motive that activated the deceased in making the gift in question to her son Thomas is

found in her statement to him following the death of her other son that she wanted to make a gift to her living son for what she had done for her deceased son during the latter's lifetime."

In the *Estate of John R. Gillingham,* 1942 Memo B.T.A., Dec. 42,102, 1942 P.H. Tax Service 64,353, gifts made within seven months of death by a decedent 64 years old were held not taxable when the motive was to equalize gifts to his children so that one child would not be favored over another. See, also, *Mercantile National Bank v. Thomas* (1941), D. Court, Texas 1941 P.H. 62,532.

There was an additional reason for the gift to George. Since 1913 the decedent had followed a liberal policy of making gifts to his son. Prior to the gifts in 1938 and 1939, he had given George over $80,000.00. (Tr. pp. 45, 46, 47.) Around 1932 he was ready to make George another gift of about $100,000.00, consisting of a large number of shares of American Telephone and Telegraph Co. and some money, but was dissuaded from doing so by his attorney who advised him that George would lose the property to the creditors of the securities firm of Gorman Kaiser Co., which had failed in 1930. George had been a partner in that company. (Tr. pp. 72, 73, 74, 80, 81, 163.)

When the Court states that "there is no evidence that the decedent had made any gifts to George after 1930 until the gifts now in issue were made" (Tr. pp. 39, 40) it conveniently overlooks this cogent reason why none were made.

When George was again in the clear, having been discharged in bankruptcy, the decedent revoked a will executed in 1932 which contained a spendthrift trust for George. (Tr. p. 73.) Then several years later, he gave George the shares of the A. T. & T. Co. stock and other securities in issue. The delay of about three years between the clearance and the gifts did not break the continuity of his policy toward George nor indicate an abandonment of his original intent.

Against the decedent's self-revealed motives, supported by these surrounded circumstances, the Court set up *inferences.* One of these is made from "the time and manner in which the transfers were made", another one from the fact that a man of his age "must have known that the sands of life were fast running out, that his life expectancy was short". (Tr. p. 41.) It has sought to bolster up these inferences with statements which are wholly unsupported such as that when the decedent made these gifts he was "spending most of his time in a chair on the porch or at the front window of his home, the normal activities of a busy life had all but ceased". (Tr. p. 41.)

The Court ties into the time and manner in which these gifts were made, two gifts of $1000.00 each to his sister-in-law and niece and one of $15,000.00 to his brother Carl. The codicils to his will stated that these gifts had been made "in lieu of" the bequests. Since the advance to the brother was made in 1937 and 1938, it was not part of the instant circumstance. The purpose of advancing the bequest to Carl had been to help him pay off his creditors in the wood

and coal business. (Tr. pp. 153, 154.) The gift to his sister-in-law was made as a Christmas gift and the one to his niece because she was sick, unmarried and had "no husband to work for her and no home". (Tr. p. 146.) There was in the case of these three gifts, as in that of the gift to Ralph, the desire to recognize the special needs of these relatives.

The Court states "it is a significant fact, however, that the decedent followed the intention expressed in his will of dividing his property, *per stirpes*". (Tr. p. 38.) This is hardly of any significance. Normally parents make equal gifts to the natural objects of their bounty who will divide their property under their wills in equal proportions.

Though the Court states that "while age alone is not a decisive test, *Slack v. Holtagel,* supra, it may well tip the scales where other facts strongly point to testamentary disposition" (Tr. p. 41), the rationale of its decision is the advanced age of decedent. This is disclosed by such statements as "he must have known that the sands of life were fast running out, that his life expectancy was short and that it was highly desirable his house be put in order. He was almost 84 years of age when the gifts were made * * *" (Tr. p. 41), and the fact that there is no direct evidence here to show that decedent ever contemplated death.

The decedent in *New England Trust Co. v. White,* U.S.D.C. Mass. 1928 (no opinion), was *92* years of age and died four months after making the gift, but it was held that the gift was not made in contempla-

tion of death. In the *Estate of Nettie I. McCormick,* 13 B.T.A. 423, the decedent created a trust when she was about *84* years of age. She died at *88* years of age of acute bronchial infection. It was held that the trust was not made in contemplation of death. In the *Estate of Edward Moore,* 21 B.T.A. 279, the decedent, within two years prior to his death and when he was about 84 years of age, gave his son securities to the value of $380,000.00. He died at the age of *86* years. It was held that the gift was not made in contemplation of death.

Even if it were to be admitted arguendo that "the premonitions and promptings which old age may give" influenced the making of these gifts, the declarations of the decedent and the attendant circumstances indicate clearly that the *dominant* motive of the donor was not a concern about death but the recognition of the special exigency which was shown to exist here.

The Supreme Court in *United States v. Wells* (supra), stated the applicable rule on "contemplation of death" as follows (pp. 117, 118, 119):

> *"The reference is not to the general expectation of death which all entertain. It must be a particular concern, giving rise to a definite motive.* * * * Old age may give premonitions and promptings independent of mortal disease, yet age cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than death, may motivate the transfer. * * * It is common knowledge that a frequent inducement is, not only the desire to

> be relieved of responsibility, but to have children, or others who may be the appropriate objects of the donor's bounty independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. *There may be the desire to recognize special needs or exigencies* or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death. * * *
>
> There is no escape from the necessity of carefully scrutinizing the circumstances of each case *to detect the dominant motive of the donor in the light of his bodily and mental condition.*" (Italics supplied.)

When the findings of the Tax Court are analyzed, it will be seen that there is not a single fact recited from which it could be inferred that the decedent made these transfers because he was contemplating death. The decision of the Court was founded on an erroneous interpretation of the term "contemplation of death". It has applied the criterion of a "general expectation of death" rather than of a "particular concern, giving rise to a definite motive".

(c) The Court disregarded other material evidence as to decedent's bodily and mental condition and found other facts which were unsupported by the evidence.

When the gross errors in the statements which the Court makes to bolster up its inference of intent are considered with the disregard of the evidence discussed under (a) and (b) hereof, it will be seen that

there is no substantial evidence to sustain the finding and conclusion that the decedent made these transfers in contemplation of death.

The Court goes far afield of the record when it states that at the time the gifts were made the decedent "was spending most of his time in a chair on the porch or at the front window of his home" and that "the normal activities of a busy life had all but ceased". (Tr. p. 41.)

This was certainly not true in December of 1938 and January of 1939. During all of the year 1938 the decedent attended all of the meetings of the board of directors of the San Jose Building and Loan Association, of which he was a director, except two. On December 21, 1938, *or the day after* he made the gifts to George and Ralph, he attended a meeting of the directors at which a discussion took place whether the association should accept the repayment of a loan totaling over a half a million dollars without the payment of a penalty for a prepayment. The decedent led the discussion and proposed a resolution that the company accept the payment of a penalty. He told the other directors that it was better to take the money because smaller loans were much more advantageous to a loan company than one large one. The other directors had such confidence in his business judgment that the motion was carried unanimously. (Tr. pp. 127, 128, 129.)

During 1938 and 1939 the decedent attended meetings of the securities and finance committee of this association and went out with the other members of

the committee to inspect properties on which loans were to be made. He would discuss these loans with the committee members and then sign the appraisals. He was also interested in the expenses of the business and checked carefully on that angle. (Tr. pp. 70, 71, 129.) During 1939, he would call frequently at the office of the association and talk with the officers about their loans and with the employees about other matters. (Tr. pp. 70, 71.)

The decedent had been president of the association for many years but had left it several years before. When the association encountered financial difficulties the directors asked him to come back and help get it out of its difficulties. This was about two years before his death, and although he was 82 years of age at the time he went back to active participation in its affairs as a director and vice president he was a factor in getting the association back in good financial shape. (Tr. p. 50.) The record shows that his interest in its affairs did not lag in 1938 or 1939. Obviously a man whose normal activities have all but ceased does not religiously attend directors' and committee meetings, discuss loans, appraisals, etc.

The Court stated that the decedent was "tax conscious, as is indicated by the fact that he deliberately divided the gifts between 1938 and 1939 in order to minimize his tax liability". (Tr. p. 41.) The record shows that this was done at George's suggestion and not the decedent's. But since the purpose to gain an additional exemption for *gift* taxes and not *estate* taxes, it is entirely irrelevant.

When the Court states that "it would be closing our eyes to the obvious to hold that thoughts of death did not enter into his mind and motivate the transfer" (Tr. p. 41), it clearly reveals that it is applying an erroneous rule of law to these facts. "Thoughts of death" are only "the general expectation of death", or at best "the premonitions and promptings" which the Supreme Court has held the statutory term "contemplation of death" does not mean. They do not constitute "a particular concern, giving rise to a definite motive". (*United States v. Wells,* supra.)

The decedent's other activities further contradict this inference. In 1938 he bought himself a new Dodge coupe car and obtained an operator's license to drive it. He drove the car in 1938 and 1939, once to San Francisco to see George. (Tr. pp. 54, 55, 56, 81, 132.)

About four months after he made the December 1938 gifts, or some three months before he died, he was planning to make a trip to Denver to see his brother Carl. He intended to make this trip as soon as he had his upper teeth pulled and a new plate made. (Tr. pp. 148, 149.) Now, a man whose normal activities have all but ceased does not plan to take long trips.

In *Estate of Arthur L. Stark,* 8 B.T.A. 1150, the decedent during the summer of 1923 contemplated a trip to Europe and often talked about it. Less than two months before he died he purchased a new Packard car which he drove himself. No one testified that decedent did not possess the same strong, vigorous

mind of former years. It was held that the petitioner had fully rebutted the presumption relative to transfers made within two years prior to death.

During 1938 and 1939 Koch would frequently walk from his home to the office of the building and loan association, a distance of five blocks. (Tr. p. 71.) Though as the Court states, on occasions he rode there in an automobile, that does not diminish the fact that on most occasions he walked. Nor is there any significance in the fact that he had George secure the stocks and bonds from his safety deposit box and call the attorney to discuss the details of the trust. He could have gotten them himself if he had chosen to do so, as he visited his bank once a month during 1938 and 1939, attended personally to his own business affairs, discussed business matters with his neighbors, drew his own checks, paid taxes and purchased stocks and bonds. (Tr. pp. 123, 124, 152, 153, 154, 155.)

What if "in at least some of the trips to the barber shop the decedent was assisted by his housekeeper"? (Tr. p. 41.) The record does not show that she assisted him, but only went along. He walked to the barber shop a block away from the house, once a month alone. Until the day of his death he was very regular in his habits, rising at 5 o'clock, shaving himself with an electric razor, eating hearty meals, calling on real estate men, bankers, etc. (Tr. pp. 136, 137, 138.)

On December 25, 1938, as had been his custom for many years previously, he walked down to the Ma-

sonic Temple and personally attended to all the details of the Christmas breakfast of the Knights Templar Commandery. He had been in charge of this breakfast for many years. He took great pains that day to see that the tables were fixed right, that the hams were cut right, that the decorations were all right and that the ladies waited on the tables. He also gave a speech to the members. (Tr. pp. 139, 140, 141.)

The petitioner did not attempt to picture decedent as being in perfect physical condition. Few men over eighty years of age are. But an examination of the physical conditions of the decedents of advanced years in the contemplation of death cases decided favorably to the taxpayers indicates that decedent was in much better condition when he made these gifts than were these other decedents.

The facts of the instant case are strikingly similar to those of *United States v. Wells,* supra. The essential facts of that case are these: John Wells died on August 17, 1921, at the age of 73 years, leaving his wife and five children surviving him. Since 1901 the decedent had been making advancements of money and other property to his children. He kept a set of books on which he charged to his children some, but not all, of the amounts transferred to them.

On December 1919, January 1, 1921 and January 26, 1921, the decedent made certain transfers of stock to his children and to a trustee for the benefit of his wife and children. The latter two transfers were made approximately seven months before his death.

At the time of these gifts Wells was suffering not only from asthma but from ulcerative colitis, a disease from which he was to die subsequently. Decedent had been informed in detail of this condition by his doctors who told him that he would get well. On September 22, 1920 he had been discharged from a hospital where he had been confined since July of that year and where a specialist in bowel diseases had diagnosed his case as ulcerative colitis and the doctors had found also marked evidence of an inflammation of the ethmoid cells which are connected with the nasal cavity. When discharged, however, he was in an improved condition and he fully recovered within the next two or three months. During this time he was in a very fair state of health, his appearance was normal and he had gained weight. He resumed his normal business activities. He told his son that "he was completely cured of the trouble that he had had and he felt good".

On November 20, 1920, he was hospitalized again for the purpose of an operation to relieve his asthma, but was discharged on December 9, 1920. On January 1, 1921, he made one of the gifts. Nine days later, on January 10th, he went back to the hospital for the completion of the nasal operation. He was discharged again on January 14, 1921 and the doctors pronounced him 90% normal in respect to the colitis but told him that he would always have asthma. The doctors told him also that he need have no anxiety about his state of health or of any recurrence of the colitis.

On January 26, 1921 he made another one of the gifts. In April he had a recurrence and in June he re-entered the hospital. His condition proved to be due to a virulent form of infection that failed to yield to treatment and he died on August 17th. The determination of the Commissioner of Internal Revenue that the transfers were made in contemplation of death was reversed by the United States Court of Claims and this judgment was approved by the United States Supreme Court. (*United States v. Wells,* supra.)

Regarding the matter of his health, the Court of Claims said (p. 153):

> "At the time the transfers were made, decedent had no reason to believe otherwise than that aside from his asthma, he was, *for a man of his age,* in ordinary health. While he had gone through a most serious and painful illness he had, as he believed, made an almost complete recovery. He was assured of this fact by his physician. * * * The repeated statements made by him to close friends and associates, his daily activities in matters connected with his business and affairs, his letters to his children assuring them of his recovered health, showed that he fully believed the assurance given him by his physician that he was cured and had nothing to fear on account of his former illness.
>
> The presumption created by the statute that the transfers in question were made in contemplation of death cannot stand against ascertained and proven facts showing the contrary to be true. * * *" (Italics supplied.)

In the *Estate of John Moir,* 47 B.T.A. (No. 104), 1942 P.H. Tax Service 64,977, the decedent died at the age of 81 years. In November, 1939, he suffered a cerebral hemorrhage and aphasia. His attending physician did not inform decedent that he had had a stroke. He recovered from this though not from the aphasia. In February and May of 1934 he made certain gifts to his children. Thereafter he consulted with his physician almost every week in 1934, 20 times in 1935, 10 times in 1936 and twice in 1937. The frequency of these visits was partially due to his affection for the physician and the fact that his son had asked the physician to keep an eye on him. In 1933 he had an operation for hemorrhoids from which he recovered. In February of 1938 he had another attack of coronary thrombosis and on September 1938 a third one which proved fatal. For many years before these gifts, he had made frequent gifts to his children as did Koch. Like Koch, he never spoke about death. Like him too, he had a considerable fortune left to take care of his own needs. Each gift had an adequate explanation. This Tax Court held that it was "not necessary to supplement it by a reference to its testamentary tax effect."

In the *Estate of Louis A. Meyers, Jr.* (1941), B.T.A. Memo Dec. 41,542, 1942 P.H. Tax Service 64,142, the decedent died at 81 years of age. Although he suffered from prostate trouble, except for a short period about one year before the date of the gift he was in good health. He died of cardiac and respiratory failure. It was held that the gift to his son was not made in

contemplation of death but to make up for an insufficiency of compensation paid the son in past years for services rendered in decedent's business.

In the *Estate of John R. Gillingham* (1942), B.T.A. Memo. Dec. 42,102, 1942 P.H. Tax Service 64,353, the decedent in 1933 had a stroke. In 1934 his blood pressure was 205 systolic, 125 diastolic, which the Court characterized as "high". (Compare these readings with Koch's normal ones, Tr. pp. 63, 64, 89.) On January 14, 1937 his blood pressure was 205/135 or higher. The doctor (like Dr. Cottrell here) did not discuss decedent's condition with him. *On the next day,* January 15, 1937 he made the gifts involved. He died about *seven months later* on August 20, 1937 at the age of 64 years of the same condition which caused the stroke. This Court held that the gifts were not made in contemplation of death but to equalize a gift to a married daughter by making a similar one to his son so that one child would not be favored over the other.

In the *Estate of John B. Waterman* (1941), B.T.A. Memo Dec. 41,551, 1942 P. H. Tax Service 64,154, decedent had a kidney operation in 1930. The wound never wholly healed but required the daily attendance of a doctor and a nurse. Later his other kidney became affected. While thus ill, he made certain gifts to his wife on March 8, 1937. *Seven weeks later,* on April 30, 1937, he died at the age of 71 years from these causes. This Court noted that he had lived longer than his doctor expected him to. Because of definite motivation associated with life, the gifts were held not includible in gross estate.

In the *Henshaw* case (supra), when she made the gift the 82-year-old decedent was suffering from a chronic stomach disturbance which required a moderate diet. The Court regarded her as in fairly good health for "a woman of her age". It said:

> "It is true that the decedent was ill at the time the gift was made, but it was not a serious illness according to all the evidence but rather a chronic gastric ailment which she had for a long period of time before the gift was suggested by her. Her son testified that at the time of making the gift, his mother had been as well as she had been ten years previous."

With respect to the decedent's state of health, the facts here are stronger than in the above cases. When Wells made two of the gifts involved in that case, he was suffering not from ulcerative colitis, the disease from which he was to die within the short space of about seven months thereafter. Adolph J. Koch was suffering from no disease when he made the gifts to George and Ralph. All his life he had enjoyed the best of health and had never been confined to his bed a day or consulted a doctor until he was treated by Dr. McGinty some five years before his death for an injury to his left hip which he received when hit by an automobile. (Tr. p. 48.) This injury knocked in the cap of his left hip. (Tr. pp. 49, 135.) Dr. McGinty testified that this injury was on the right side, but both George and the housekeeper, who observed decedent daily, testified it was on the left side. (Tr. pp. 49, 135.)

Whenever he made a quick turn, the left hip got out of place and caused him to fall. (Tr. pp. 113, 139.) He had two such falls caused by this injury, one on May 18, 1938 and one on June 29, 1939, both while he was shaving himself in the bathroom. This latter fall ruptured his left hypogastric artery and brought on an extraperitoneal hemorrhage which caused his death less than twenty-four hours later. Thus Koch died as the result of an accident and not of a fatal illness. (Tr. pp. 110, 111, 114.)

Dr. Cottrell, who treated him on the occasion of the first fall in May 1938, diagnosed the case as one of paralytic stroke. It is submitted that this diagnosis was entirely incorrect. Cottrell did not examine Koch's body nor did he take Koch's blood pressure or temperature, as any conscientious doctor would have done. (Tr. p. 90.) His diagnosis was purely superficial, based on the fact that Mrs. Compton had told him that Koch had fallen and that he could not use his left leg, arm and hand. (Tr. p. 88.) Four days later, on May 22nd, he took Koch's readings at which time they were: Systolic 145, diastolic 75, pulse 84, temperature 98.2. (Tr. p. 89.) Dr. Childers testified that these were normal readings for a man of Koch's age, that an elevated blood pressure of at least 200 systolic, over 110 diastolic would have been necessary for a stroke, and that there would be no material descent in the blood pressure following a stroke, so that it was absolutely impossible for Koch to have had a stroke on May 18th with these normal readings. (Tr. pp. 63, 64, 65.)

If this were not sufficient to completely discredit Cottrell's superficial diagnosis, it would be impeached by the fact that Cottrell, on cross-examination, admitted that in the case of a stroke on one side of the body the reflexes on the opposite side are generally increased because of an irritation to the brain surfaces but that the decedents were not so increased. Cottrell offered no explanation why they were not. (Tr. pp. 93, 94.) Dr. McGinty, who testified that Koch had "probably had a light stroke, because he cleared up so quickly" (Tr. p. 114), had not treated him on the occasion of the first fall and only made this observation as a neighbor. (Tr. p. 114.)

In any event, even if the diagnosis were correct, Dr. Cottrell did not tell the decedent that he had suffered a stroke, but reassuringly told him "stay in bed a few days and you will be all right". (Tr. p. 134.) The thought never occurred to Koch that he might have had a stroke.

When found by Mrs. Compton on his bed (to which he had been able to move himself from the bathroom) he was perfectly conscious and answered her question, "what's the matter, are you sick?" with the statement, "no, I was in the bathroom shaving and I fell and hurt my hip". (Tr. p. 133.) This incident, therefore, could hardly have caused him any concern, nor interrupted his natural propensity to continue believing that "I am going to live to be a hundred". (Tr. p. 150.) The suggestion made by his son-in-law, Jim Swickard, several months after the

fall that he might "croak" produced an angry retort from him, "Don't worry about me croaking. I'll live longer than you do." (Tr. p. 156.) Dr. McGinty, who saw him nearly every day in 1938 and 1939, testified that "he looked wonderfully well". His limp that he had after Dr. Cottrell took care of him had cleared up almost entirely; that "he got around without using a cane very much and was very independent, refusing any kind of assistance." (Tr. pp. 107, 108.) Certainly there was nothing in his conduct to indicate that he was worried about this condition.

The quick recovery from the effects of the May fall (the limp had cleared up almost entirely), must have strengthened his deeply-rooted conviction of longevity based on the fact that he had enjoyed perfect health for over eighty years. But for his subsequent unpredictable accidental death, he might have lived many more years, even if he did fall short of his goal. He believed himself completely recovered from the effects of the May fall and he continued on in the even tenor of his ways. The extent of his activities has been discussed herein before. He was described by the witnesses as a "curiosity" because of his independence, a "wonderful neighbor" with a "happy outlook on life" and a "kidding way", who was "always cheerful" and "pretty much of a Christian Scientist when it came to thinking there was anything wrong with himself", and who never talked about death with anyone, even Mrs. Compton, who was with him much of the time in 1938 and 1939. (Tr. pp. 112, 116, 124.)

It is clear from the foregoing that there was nothing in decedent's bodily, as well as in his mental condition, which would give rise to a particular concern about death of sufficient cogency to be stronger than or dominate over the motives which he revealed in his statements to his closest associates.

POINT II.

NOR WAS THE TRUST FOR THE GRANDSON OF DECEMBER 20, 1938, INCLUDIBLE IN DECEDENT'S GROSS ESTATE UNDER SECTION 811 (d) OF THE INTERNAL REVENUE CODE.

Though the effect of Section 2280 of the Civil Code of California was to reserve to the decedent a power to revoke the trust, the trust was not includible in the decedent's gross estate under the broad language of Section 811 (d) of the Internal Revenue Code (Section 302 (d) of the 1926 Revenue Act). Section 2280 is a peculiar local rule obtaining only in California, the universally applied common law principal being that a trust is irrevocable unless the power to revoke is specifically reserved. As a statutorily imposed power of revocation, it is a condition imposed by law and as such not within the contemplation of Section 302 (d), which appears to require the formal reservation of the power in the trust instrument.

The essential difference between a formal power to "revoke, alter or amend" within the meaning of this section and a condition imposed by law is the rationale for the decision of the Supreme Court in *Helvering v. Helmholz,* 296 U.S. 93, 56 Sup. Ct. 68.

There a power in the trust instrument to terminate upon delivery to the trustee of a written instrument signed by all of the then beneficiaries, of whom trustor was one, was held not within the statutory contemplation as it was merely declaratory of a right conferred by state law.

In *Poor v. White,* 296 U.S. 98, the Supreme Court held that the section did not apply if the power was one not reserved to the settlor in the original declaration of trust. There the power had been omitted, but it was provided that the trust could be terminated in whole or in part at any time by the three trustees, including the settlor who was also a trustee. Resigning as trustee, the settlor was reappointed a year later by the remaining trustees after the resignation of the settlor's successor. The unexercised power was viewed by the Court as having been acquired, not by reason of formal reservation, but by virtue of the settlor's appointment as a trustee, and thus "neither technically nor in substance" as falling within Section 302 (d).

In *Dorothy Allen v. Commissioner,* 38 B.T.A. 871 (1938), the United States Board of Tax Appeals considered an analogous question under Section 501 (a) of the Gift Tax Act of 1932. The taxability of a gift made by a minor was involved. If the gift was complete when made, it was taxable then, otherwise not until the minor, on attaining majority, failed to exercise his general legal right to avoid his gifts. Recognizing this power as a condition imposed by law, the Board, in holding the gift complete when made, cited both the *Helmholz* and *White* cases to the

effect that there is a distinction between a power to revoke and a condition of law and that the former must arise from the trust instrument itself. Reversing the Board, the United States Circuit Court of Appeals for the Third Circuit decided that there was no difference between a power of a donor to revoke which was expressly reserved in an instrument of transfer, and a power imposed by law and that the gift was thus incomplete when made. Both the *Helmholz* and the *Poor* cases were distinguished on the ground that the question was not there presented, as the settlor's powers came to them either as a beneficiary (Helmholz) or as a trustee (White) and not as a settlor as such.

Hughes v. Commissioner, 104 Fed. (2d) 144 (C. C. A. 9th, 1939), also involving a construction of Section 501 (a), was concerned with a California transfer which was complete and irrevocable as a gift, no power to revoke having been reserved by the settlor in the trust agreement. Whether Section 2280 was applicable was not decided, since it was held that the law of Massachusetts (the situs of the trust) governed in determining when the transfer became consummated as a gift. The observation of the Circuit Court in the *Allen* case—that it was implicit in the *Hughes* case that a power to revoke a transfer in trust arising by operation of law would come within the purview of Section 501 (a)—was, therefore, purely obiter. Clearly neither case is controlling here.

The distinction attempted in the *Allen* case, however, overlooks the treatment by the Supreme Court of the termination clause in the Helmholz trust as

the equivalent of the general rule that all parties in interest may terminate. This rule requires the consent of the settlor during his lifetime. It is thus implicit in the case that the clause did provide for the settlor's consent. For this reason alone the clause "added nothing to the rights which the law conferred", and the essential difference between a power to alter and a condition imposed by law was necessarily noted.

Though the language of the 1936 amendments to Section 302 (d), which requires inclusion no matter in what capacity the power to revoke is exercisable or from what source it was required, is very broad, the intent (except to remove doubts about a power to "terminate" being equivalent to the trio "revoke, alter and amend") was to obviate the effect of *White v. Poor* as to action taken according to an instrument other than, and subsequent to, the creating document. This intent is clearly spelled out from the legislative history of the amendments. See H.R., Rept. No. 2818, 74th Congress, 2nd Session, at pp. 9-10, where it is stated that "The changes made by this section are made necessary largely by reason of the decision of the United States Supreme Court in the case of *White v. Poor* (296 U.S. 98). The Court held that the power to terminate existing in the decedent at the date of her death resulted from the action of the other trustees and not by virtue of any power *reserved* to herself or settlor in the original estate. It is therefore provided that Section 302 (d) covers a power whether *created* at the time of transfer or *thereafter* arising from any source and whether exercisable in an individual or representative capacity." (Italics ours.)

The word "source" is not defined by the regulations (Article 20, Estate Tax Regulation 80) to include conditions imposed by law. There is thus absent any congressional approval by subsequent enactments. When construed in view of the limited legislative purpose, it would seem clear that conditions imposed by law are not envisaged by the amendments.

The distinction drawn in the *Helmholz* case is recognized in other cases. In *Newhall v. Casey,* 18 Fed. (2d) 447 (D. Mass. 1927), a transfer from a husband to wife which was an absolute gift in form was held not to be a part of his taxable estate subject to inheritance tax, although a condition imposed by Massachusetts law made such gifts revocable during the husband's lifetime. *Safe-Deposit & Trust Company v. Tait,* 54 Fed. (2d) 383 (D. Md. 1931), was a case where the condition imposed by law was the power of an incompetent (still existing at date of death) to avoid a transfer. It was argued that, as he could have avoided the gift during his lifetime, his death, as in the case of a formally reserved power, was the fact or event which, by removing the possibility of revocation, made the gift absolute. The transfer was held not includible for federal estate purposes. In *United States v. Goodyear,* 99 Fed. (2d) 523 (C. C. A. 9th, 1938), an irrevocable transfer by a husband to his wife of a present, existing and equal interest in community property acquired before July 29, 1937 (the effective date of an amendment to Section 161(a) of the Civil Code) was held not to be subject to a power to "alter, amend or revoke" includible pursuant to Section 302 (d) because of the statutory rights of management and control of the husband.

POINT III.

THE FINDING THAT THESE TRANSFERS WERE MADE IN CONTEMPLATION OF DEATH MAY BE REVIEWED BY THIS COURT.

The finding that these transfers were made by the decedent in contemplation of death is an ultimate finding, which is really a conclusion of law, or a determination of mixed law and fact, based on the Tax Court's finding of primary, evidentiary or circumstantial facts. As such it is subject to judicial review on which review the Court may substitute its judgment for that of the Tax Court. (*Helvering v. Tex-Penn Oil Co.*, 300 U.S. 481, 57 S. Ct. 569.)

In this case the question was whether a certain transaction was within the non-recognition provisions of Section 202 (b) of the Revenue Act of 1918. In pursuance of a plan of reorganization the assets of an oil company and undivided interests in oil leases owned by individuals were conveyed to a new company which delivered part of its shares and a sum of cash to the old company (later dissolved) and paid cash to the individuals. The Board of Tax Appeals, after finding the evidential facts, made an "ultimate finding" that the consideration moving to the old company from the new one included the cash delivered to the former as well as the shares and upon that ground refused to apply the non-recognition of gains provision. The Court said, at p. 491:

> "In addition to and presumably upon the basis of these findings (of circumstantial facts) the board made its 'ultimate finding'. And upon that determination it ruled that the transaction was not within the non-recognition provisions of sec-

> tion 202 (b). The ultimate finding is a conclusion of law or at least a determination of a mixed question of fact and law. It is to be distinguished from the findings of primary, evidentiary or circumstantial facts. It is subject to judicial review and on such review the court may substitute its judgment for that of the Board."

In the *Estate of Jefferson Hodgkins v. Commissioner,* 44 Fed. (2d) 43, reversing 12 B.T.A. 375, cert. denied 283 U.S. 82j, 51 S. Ct. 350, the Circuit Court reviewed the decision of the Board of Tax Appeals that the decedent made certain transfers in contemplation of death and held that there was insufficient evidence that decedent made the transfers because of some known information which he believed or entertained a fear might result in his death.

The rule is stated in *Paul & Mertens—Law of Federal Income Taxation,* vol. 5, paragraph 44.11, as follows:

> "It is clear therefore that the Circuit Court of Appeals has ample power and even a duty to search the record to find whether any substantial evidence supports the findings of the Board, because whether there is any such evidence is a question of law and not of fact. Putting the point another way, the Appellate Court has not only the jurisdiction and power but also a duty to determine the legal effect of the facts in a case."

It is respectfully submitted that there is no substantial evidence to support the finding and conclusion that the decedent made these transfers in con-

templation of death, that the Tax Court has applied an erroneous principle of law to the facts and that the petitioner successfully rebutted both the presumption that the Commissioner's determination was correct and the statutory one that gifts made within two years of death are made in contemplation of death.

Dated, San Jose, California,
November 15, 1943.

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